New Brunswick Human Rights Commission
Guideline on Sexual Harassment
June 2011

Please Note

The New Brunswick Human Rights Commission ("Commission") develops guidelines as part of its mandate to prevent discrimination. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* ("*Code*").

This guideline gives the Commission's interpretation of the provisions of the *Code* relating to discrimination on the basis of sex, particularly sexual harassment, as set out in section 7.1 of the *Code*.[1] It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission's staff.

1. Introduction to Sexual Harassment

Discrimination on the basis of sex, includes sexual harassment.[2] The New Brunswick *Human Rights Act*, however, has specific provisions in section 7.1 which prohibit sexual harassment in the five areas of human activity. New Brunswick is one of a few provinces to have enacted sexual harassment provisions in its *Code*.

The *Code* prohibits sexual harassment in areas such as employment, housing, public services (i.e. schools, hospitals, restaurants, malls, and insurance), and membership in labour unions and professional associations.[3]

Sexual harassment can be committed by males with female victims, by females with male victims, and can include same-sex sexual harassment.[4] Sexual harassment often involves a power imbalance. Women have traditionally and to a great extent still occupy a lower status in society especially in the workforce. This may account for the fact that the majority of the sexual harassment complaints filed with the Commission are against males.

There is no defence for sexual harassment. If the complainant has established a *prima facie* ("at first sight") case of sexual harassment then the respondent must either:
(1) disprove that the conduct was sexual harassment;
(2) or show that the conduct was welcomed.

2. Definition of Sexual Harassment

"Sexual Harassment" is defined in the *Code* as:

> **7.1(1)** In this section
>
> ...
>
> **"sexually harass"** means engage in vexatious comment or conduct of a sexual nature that is known or ought reasonably to be known to be unwelcome

A vexatious comment or conduct causes humiliation and is offensive or abusive to the recipient.

Sexual harassment includes harassing comments or conduct made to a person because of his or her gender.[5] This can include comments or conduct relating to an individual's sexual attractiveness/unattractiveness, or comments relating to one gender's superiority over the other gender.

Sexual harassment and inappropriate gender-related behaviour can include but is not limited to the following conduct:

- Unwelcome physical contact;
- Inappropriate conversations with sexual content;
- Leering or inappropriate staring or whistling;
- Gender related verbal abuse or taunting;
- Inappropriate gifts;
- Bragging about sexual prowess;
- Obscene phone calls;[6]
- Offensive jokes or comments of a sexual nature;
- Posting pictures of a sexual nature in the workplace;
- Questions or discussions about sexual activities;
- Comments about an individual's physical characteristics;
- Sexually suggestive acts;
- Propositions of physical intimacy;
- Demands for dates or sexual favours;
- Suggestive or offensive remarks about members of a specific gender.

Sexual harassment may be subtle or obvious, verbal or non-verbal. Sexual harassment does not necessarily have to be persistent and severe.[7] A single incident can form the basis of a sexual harassment complaint. The severity and frequency of the sexual harassment will, however, often be considered when determining the appropriate remedy.

Sexual harassment may also include harassment towards others or harassment in general which affects an individual because of her or his sex, creating a hostile or poisoned environment.

> **Example:** Statements made by coworkers expressing the belief that women are not capable of becoming supervisors. Similarly, a poisoned environment may be created by the circulation of materials by male employees about women with a demeaning or threatening content.

3. Sexual Harassment in Employment or Associations

The *Code* prohibits employers, representatives of employers, or persons employed by the employer from sexually harassing any employee or potential employee.[8]

The *Code* also prohibits representatives of associations (employers' organization, trade union/association, professional/business association) from sexually harassing members, or potential members of the association.[9]

Sexual harassment in employment is any conduct that is:

(1) unwelcome,
(2) of a sexual nature, and
(3) has a detrimental or negative effect on the work environment.

Responsibilities of Employers:

Employers have a responsibility to ensure that their work environments are free from conduct and behaviour that may constitute sexual harassment.

Employers should have a sexual harassment policy and procedure in place to educate employees about sexual harassment and to help supervisors and management respond appropriately to allegations of sexual harassment. Having an effective sexual harassment policy in place can help decrease an employer's liability in the event of a complaint being filed.

Employers can be held responsible for the conduct of their employees if the employer has not acted with care to prevent the sexual harassment from occurring. Therefore, employers have a responsibility to immediately respond to and investigate complaints of sexual harassment in the workplace. The reason employers can be held responsible for the actions of their employees is because the employer has control over the employment organization and has the authority to take corrective action to remove unacceptable working conditions.[10]

When determining whether or not to hold an employer accountable for an employee's conduct, it is first considered whether the employer was aware of the alleged sexual harassment, and second, whether the employer, when becoming aware of the sexual harassment, took steps to remedy the situation. The employer will generally not be found liable if:

(1) the employer can show that the alleged conduct was committed without the employer's knowledge or consent and with the employer exercising the required diligence and care;
(2) the employer took immediate steps to remedy the situation (ie. by investigating the alleged sexual harassment if an internal complaint process exists, or firing the alleged harasser if the employer finds a basis for doing so).[11]

It is also important to remember that if an incident of sexual harassment is reported, the employer should never make the complainant face the alleged harasser.[12]

Responsibilities of Employees:

Employees have a responsibility to inform their employer of incidents of sexual harassment.

If the employee does not tell anyone that he/she is being sexually harassed then the employer may not have a chance to remedy the situation.[13]

It is not always necessary to inform the harasser that the conduct is unwelcome. There may be situations where the employee is fearful of loosing his/her job or where, for various reasons, he/she does not feel comfortable confronting the harasser and expressing that the conduct is unwelcome. It must be shown, however, that the harasser knew or ought to have known that the conduct was unwelcome. For example, the complainant's body language (ie. walking away, displaying discomfort, not reciprocating the behaviour etc.) can be an indication to the harasser that the conduct is unwelcome. Mutually acceptable workplace flirtation is not sexual harassment.

A workplace may have an internal policy or procedure for addressing and investigating allegations of sexual harassment, and this option for remedying the situation should be explored by the employee. However, the existence of an internal human rights resolution policy does not take away a person's right to file a complaint with the Commission.[14]

4. Sexual Harassment in Services, Facilities & Accommodations

The *Code* prohibits anyone who provides goods, services, facilities, or accommodations to the public from sexually harassing anyone who is a recipient or seeking to be a recipient of these goods, services, facilities, or accommodations.

The *Code* recognizes that there may be a power imbalance in many of these kinds of service relationships, which could potentially lead to cases of sexual harassment.

> **Example:** A male Real Estate agent was found to have sexually harassed one of his female clients when he made a number of inappropriate sexual comments in her presence. [15]

5. Sexual Harassment in Housing

The *Code* prohibits sexual harassment by anyone who provides commercial or residential housing against any of their occupants or any person seeking to be an occupant. [16]

Superintendents are in a position of power over their tenants because he/she approves the tenant's lease and can affect the use and enjoyment of the tenant's rental property. Superintendents also have the authority to issue eviction notices and approve or deny subleases. The superintendent's relationship with their tenant may affect how they interact with the tenant and how promptly they respond to the tenant's problems and requests.[17]

This power imbalance can lead to situations of sexual harassment committed by superintendents against their tenants, which can also lead to actions of reprisal if the tenant complains of the sexual harassment or does not reciprocate the behaviour.

6. For More Information

For further information about the *Code* or this policy, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at www.gnb.ca/hrc-cdp or email us at hrc.cdp@gnb.ca

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[1] The Commission would like to acknowledge and thank the human rights commissions from various jurisdictions across Canada for the opportunity to study and draw from their policies and documents on sexual harassment.

[2] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352 at paras. 44-67.

[3] New Brunswick *Human Rights Act*, R.S.N.B. 1973, ss. 7.1(1)-7.1(6).

[4] *Ewart v. Kilburn* (2007), C.H.R.R. Doc. 07-744 (N.B. Bd.Inq.) is an example of same-sex sexual harassment. See also: *Smith v. Menzies Chrysler Inc. (No.2)*, 2009 HRTO 1936, CHRR Doc. 09-2527.

[5] *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont.Bd.Inq.). In this case, the Board of Inquiry found that the respondent employee's constant inappropriate comments concerning the complainant's figure, (saying "waddle, waddle" when she walked or "swish, swish" to imitate the sound of her nylons rubbing together) constituted sexual harassment. The Board further concluded that any conduct which "denigrates a woman's sexuality" constitutes sexual harassment.

[6] *Veitenheimer v. Orange Properties Ltd.* (1992), 20 C.H.R.R. D/462 (Sask Bd.Inq.).

[7] *Magill* v. *Atlantic Turbines Inc.* (1997), 28 C.H.R.R. D/293 (P.E.I. Bd. Inq.) at para. 47.

[8] New Brunswick *Human Rights Act*, R.S.N.B. 1973, s. 7.1(2).

[9] New Brunswick *Human Rights Act*, R.S.N.B. 1973, s.7.1(3).

[10] *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, 8 C.H.R.R. D/4326, 40 D.L.R. (4th) 577 at 314.

[11] *Steeves v.. RPK Inc.* (2007), CHRR doc. 07-743 (N.B. Bd.Inq.). The New Brunswick Board of Inquiry did not order special damages because of the immediate and proactive behaviour of the employer by suspending and eventually firing the respondent when he first heard of the allegations of sexual harassment.

[12] *Hariott v. National Money Mart Co.*, 2010 HRTO 353, CHRR Doc. 10-0412.

[13] *Daigle v. Hunter* (1988), 10 C.H.R.R. D/5670 (N.B. Bd.Inq.). This was the first sexual harassment complaint heard by the New Brunswick Board of Inquiry. The Board found that the conduct of the respondent did not amount to sexual harassment even though some off-colour remarks and minor touching occurred. The Board found that his conduct was part of a normal work environment and that the complainant did not object to his conduct at the time, and never informed her employer that she had problems with her work environment.

[14] *Birkett v. Canada (Human Rights Comm.)*, 2007 FC 428, 63 C.H.R.R. D/336.

[15] *Haykin v. Roth*, 2009 HRTO 2017, CHRR Doc. 09-2642.

[16] New Brunswick *Human Rights Act*, R.S.N.B. 1973, 7.1(5).

[17] *Kertesz v. Bellair Property Management* (2007), CHRR Doc. 07-632 HRTO 38 at para. 34
See also: *Dietrich v. Dhaliwal*, 2003 BCHRT 6.; *Hill-LeClair v. Booth (No. 3)*, 2009 HRTO 1629, CHRR Doc. 09-2175.